

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOE A. THOMAS)	
Claimant)	
VS.)	
)	
ERNEST-SPENCER, INC.)	Docket No. 237,572
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appeals Administrative Law Judge Bryce D. Benedict's June 6, 2002, Award denying claimant's request for post award medical treatment. The Appeals Board placed this case on its summary calendar without oral argument.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD

The Appeals Board (Board) has considered the record listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's post award medical treatment request. The ALJ found claimant's testimony, coupled with the records of chiropractor Dr. Michael A. Truppo of Aurora, Colorado, proved claimant was in need of medical treatment for low back pain. But the ALJ further found that claimant failed to prove that his need for medical treatment was related to the August 7, 1998, back injury he suffered while employed by respondent.

Claimant appeals and argues that the ALJ's Award should be reversed. The claimant contends he established through his testimony that his current need for medical treatment is the result of his continuing back problems directly related to the August 7,

1998, work-related back injury. Claimant argues that expert medical testimony is not essential to establish the existence, nature and extent of disability of an injured worker. Additionally, claimant appeals the ALJ's attorney fee award of 13.95 hours at \$100 per hour for a total of \$1,395. Claimant requests the Board to award attorney fees at \$115 per hour and make an additional award of three more hours from the original request of 12.95 hours for time spent since the claimant submitted his case to the ALJ for a total attorney fee award of \$1,834.25.

Conversely, the respondent requests the Board to affirm the ALJ's Award except for the attorney fees and costs. Respondent argues that claimant failed to prove that his current need for medical treatment for his low back problems is directly related to the August 7, 1998, work-related accident. Respondent argues that the ALJ erred in ordering respondent to pay claimant's request for attorney fees and the court reporter's costs. Respondent argues the post award attorney fee request should be denied and the court reporter costs should be assessed against the claimant because his post award medical treatment request was without merit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' briefs, the Board makes the following findings and conclusions:

Claimant injured his low back while working for the respondent on August 7, 1998. Respondent provided medical treatment for claimant's low back injury and eventually through orthopedic surgeon Craig L. Vosburgh, M.D.

Dr. Vosburgh first saw claimant on August 18, 1998, and diagnosed claimant with lumbar spine sprain. He placed claimant in a physical therapy program and prescribed medication. Dr. Vosburgh saw claimant on three occasions and released claimant from his care without restrictions to return to work on September 29, 1998. At that time, claimant only exhibited mild tenderness in his low back. Dr. Vosburgh's final impression was resolved lumbar strain.

Claimant returned to see Dr. Vosburgh with recurrent low back pain on June 23, 1999. During the nine month period between visits, claimant had performed work in manual labor jobs such as roofing, concrete construction and janitorial. Claimant also had spent at least a couple of months in the county jail for, among other offenses, disorderly conduct as a result of claimant actively breaking up a fight. Dr. Vosburgh again placed claimant in a physical therapy program and prescribed anti-inflammatory medication. The doctor saw claimant on three occasions and again released claimant to return to regular duties without restrictions. In a letter to respondent's insurance carrier dated August 10, 1999, Dr. Vosburgh opined, "I am uncertain whether the patient's current symptoms are

directly related to his injury in August of 1998, but he denies any new injuries since that time."¹

On December 8, 2000, the parties entered into an Agreed Award granting claimant a 5 percent permanent partial general disability based on the functional impairment opinion of orthopedic surgeon Dale E. Darnell, M.D. Dr. Darnell saw claimant on May 24, 2000, for an independent medical evaluation. The Agreed Award also provided for future medical treatment upon proper application to the Director.

On February 16, 2001, claimant filed an Application for Post Award Medical.² But claimant did not pursue the post award medical request until March 4, 2002, when his evidentiary deposition was taken by telephone. At that time, claimant had relocated to Denver, Colorado.

The post award medical hearing was held before the ALJ on March 14, 2002. No one testified at that hearing. Claimant requested that his current low back complaints be treated through chiropractor Dr. Truppo in Aurora, Colorado. Claimant had seen Dr. Truppo on two occasions, January 4, 2002, and January 11, 2002. Claimant requested that the initial visit to see Dr. Truppo be paid with his unauthorized medical expense and for Dr. Truppo to be appointed as claimant's authorized treating physician.

After the March 14, 2002, hearing, the parties filed a stipulation on April 4, 2002, that contained Dr. Vosburgh's medical records and Dr. Truppo's medical records.

In claimant's request for post award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.³ The Workers Compensation Act defines burden of proof as "the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

Here, the claimant argues he has satisfied his burden of proof through his testimony that his current need for medical treatment for his low back complaints is directly related to his August 7, 1998, accidental injury. Claimant acknowledges that he has presented no medical evidence that directly relates his current need for medical treatment to the August

¹ Stipulation (filed April 4, 2002).

² See K.S.A. 44-510k(a).

³ See K.S.A. 1998 Supp. 44-501(a).

⁴ See K.S.A. 1998 Supp. 44-508(g).

7, 1998, accidental injury. But claimant argues expert medical testimony is not essential to establish the "existence, nature, and extent of disability" of an injured worker.⁵

The Board recognizes, under certain conditions, the injured worker's testimony may establish the existence, nature and extent of his disability. But the Board finds that testimony must persuade the trier of fact that the injured worker's position on that issue is more probably true than not true. Here, the ALJ found, and the Board agrees, that claimant has failed to satisfy through his testimony alone his burden of proof.

In a post award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the effects of the original accidental injury which was the subject of the underlying award.⁶ In this case, the Board finds significant the fact that claimant is seeking medical treatment in 2002 for an accidental injury that occurred some four years before in 1998. Additionally, the Board also finds significant that before he saw Dr. Truppo in Colorado in January 2002, claimant had not sought any medical treatment for his low back complaints since 1999. Since claimant last saw Dr. Vosburgh on August 18, 1999, claimant has performed the following work and non-work activities: (1) worked on an assembly line using an air sander and ratchet wrench working 10 hour shifts, (2) babysat with his two children while his girlfriend worked, (3) painted houses working 8 to 10 hours shifts, and (4) worked as a telephone salesperson in Colorado working 10 hour shifts. Claimant testified his low back symptoms increased, at least on occasion, after performing all of the foregoing jobs or the babysitting activities. In fact, at one point in his testimony claimant acknowledged, "If I do anything physical it gets worse."⁷

Dr. Truppo's medical records indicate that claimant gave a history of injuring his back at work on September 13, 2001, instead of August 7, 1998. Dr. Truppo's treatment recommendation also included complaints to claimant's cervical spine in addition to his lumbar spine.

The Board finds claimant's current back pain complaints and other related back symptoms are just as likely, if not more likely, to be related to the work and other non-work activities claimant has performed since he last received medical treatment for the August 7, 1998, back injury on August 18, 1999. As noted above, at the time that Dr. Vosburgh treated claimant in the summer of 1999 he was uncertain whether claimant's complaints

⁵ See *Graff v. Trans World Airlines*, 267 Kan. 854, Syl. ¶ 3, 983 P.2d 258 (1999) and cases cited therein.

⁶ See K.S.A. 44-510k(a).

⁷ Thomas Depo. (March 4, 2002) at 52.

were directly related to his August 7, 1998, accidental injury.⁸ Over two and one-half years elapsed between the time Dr. Vosburgh expressed that opinion and the March 4, 2002, deposition testimony of claimant. As previously noted in his deposition, claimant described the many physical work and non-work activities he had performed during that two and one-half year period and the effect those activities had on his low back. The Board finds those activities performed over that two and one-half year period of time place even more uncertainty on the issue of whether claimant's current need for medical treatment for his low back symptoms has any relationship to his August 7, 1998, accidental injury.

In regard to claimant's request for post award attorney fees, the Board affirms the ALJ's award of attorney fees and also approves an additional three hours requested by claimant for time spent since he submitted the case to the ALJ for a total of 15.95 hours at \$100 per hour for a total amount of attorney fees of \$1,595. The Board finds claimant's request for additional medical treatment was not a frivolous request as argued by the respondent.

AWARD

WHEREFORE, the Board affirms ALJ Bryce D. Benedict's June 6, 2002, Award that denied claimant's request for post award medical treatment and modifies the total attorney fee request to \$1,595 which compensates claimant's attorney for time spent since the case was submitted to the ALJ.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁸ Stipulation (filed April 4, 2002).

c: John Ostrowski, Attorney for Claimant
Anton Andersen, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation